On that the jury found the appellant guilty.

For ourselves we see nothing to quarrel with in the summing-up except the one point that it did not deal with the possibility of what was done amounting to causing death by a negligent act.

In our view, however, that is an omission which comes fairly and squarely within the scope of the proviso to section 60 of the Judicature Act. It is abundantly clear that the jury accepted the evidence of the prosecution witnesses as to what happened that evening. That is perfectly clear from the fact that they rejected any question of accident, of provocation, of sudden quarrel or of private defence. All of these were, so to speak, alternative ways of looking at the matter if the jury thought that the appellant's story in any way detracted from the evidence for the prosecution.

In the circumstances we are satisfied that the omission to put the question of negligence to the jury could have had no effect whatsoever on their decision because it was based on a set of facts which they had clearly rejected. That being so the case falls fairly and squarely within the scope of the proviso to section 60 of the Judicature Act.

Here I would quote the words of Lord Goddard in the case of *Oster-Ritter* [1]:—

"It is impossible to believe that, even if the proper direction had been given to the jury, they could have come to any conclusion other than that the defendant was guilty of the offence".

These words, in our view, apply to the present case. It is impossible to believe that even had the defence of negligence been put to the jury they could have come to any conclusion other than that the appellant was guilty of the offence of murder having rejected the possibility of his being guilty of culpable homicide not amounting to murder on any of the other grounds that were put to them.

The appeals are dismissed.

Appeals dismissed.

KUPPUSAMY v. GOLDEN HOPE RUBBER ESTATE LTD.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) November 10, 1965]

[K.L. — Federal Court Civil Appeal No. 39 of 1964]

Workmen's compensation — Workman acting contrary to orders of employers — Whether accident arose out and in course of employment — Workmen's Compensation Ordinance, 1952, ss. 4, 27 and 30.

The deceased was employed by the respondent company as a weeding labourer. On the day in question she went to the daily "muster" of work-people which was held prior to commencing the labours of the day with a view to the work-people obtaining instructions. She and others received certain instructions but finding that she had provided herself with the wrong tool for her appointed labours she returned to her house without the permission of anyone in a supervisory capacity. This was against the rules of the estate. At her home she fell down and sustained injuries from which she died. The arbitrator found that workman's compensation was payable to the minor children of the deceased but on appeal to the High Court, the decision was set aside on the ground that at the time she fell the employment of the deceased for the day had not yet commenced and that consequently she had not died by reason of an accident arising out of and in the course of that employment ([1964] M.L.J. 178). The children appealed against this decision.

Held: although the deceased in this case was doing something which she was forbidden to do, the act was done for the purposes of and in connection with her employer's trade and business and therefore the accident must be deemed to have arisen out of and in the course of her employment.

Cases referred to:—

(1) *Noble* v. *Southern Railway Co.* [1940] A.C. 583.

(2) *Fisher* v. *London, Midland and Scottish Railway Co.* [1931] A.C. 351.

(3) *Garrallan Coal Co. Ltd.* v. *Anderson* [1927] A.C. 59, 68.

(4) *Holmes* v. *Great Northern Railway Co.* [1900] 2 Q.B. 409 at p. 411.

(5) *Sharp* v. *Johnson & Co. Ltd.* [1905] 2 K.B. 139 at p. 145.

(6) *Cross, Tetley & Co. Ltd.* v. *Catterall* 18 B.W.C.C. 445, at page 448.

(7) *M'Garvey* v. *Caledonian Stevedoring Co. Ltd.* [1943] 1 All E.R. 611.

(8) *St. Helen's Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59, at p. 71.

(9) *Thomas* v. *Pentremawr Colliery Co. Ltd.* 19 B.W.C.C. 331 at p. 338.

FEDERAL COURT.

P. G. Lim (Miss) for the appellant.

M. Shankar for the respondents.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal in proceedings under the Workmen's Compensation Ordinance arising from the death of a woman Sanjayee d/o Murugan who died on Dusun Durian Estate on 2nd October, 1961, leaving two dependent children.

An inquiry was held by a labour commissioner under section 27 of the Ordinance. It was then agreed that the deceased woman was a workman within the meaning of the Ordinance, that she had attended a "muster" of employees on the morning of 2nd October, 1961, that shortly after so doing she fell and sustained injuries whereby she died and that if compensation was payable the amount was $2,880. It would also seem to have been agreed, at least the parties have throughout treated it as being agreed, that the fall was the result of an accident. Agreement, however, was not reached as to

whether the accident arose out of and in the course of her employment.

In the course of his inquiry the commissioner recorded a considerable body of evidence. That was a perfectly right and proper thing for him to do because it would be unreasonable to expect either an employer or a workman to agree to anything before all the relevant evidence had been made available. At the conclusion, however, he went beyond his statutory duty, which was to record the points of agreement and disagreement, and proceeded to state his views on the affair as a whole and, in particular, to state his view that the deceased woman had died in consequence of an accident arising out of and in the course of her employment and that compensation was therefore payable.

There can be no question of this action on the part of the commissioner having done anything in the way of invalidating the proceedings (and no such point has been taken by either of the parties). Indeed in the present case it does not seem to have done any harm. Counsel, however, have invited us to state our opinion on the point which is said to be of some general importance and, although it is no business of this court to tell labour commissioners, or any other functionaries of government, how to do what they are paid to do, for myself I would say it is wrong for a labour commissioner to express his own views on matters of this sort with regard to which he has failed to secure agreement between the parties.

To proceed, after the inquiry the question of the employers' liability to pay compensation was brought before an arbitrator under section 30 of the Ordinance. By agreement between the parties the arbitrator did not hear the evidence afresh but considered the matter on the basis of the evidence as recorded by the labour commissioner. In the event he stated he was "inclined to agree" with the recorded findings of the labour commissioner and this has been treated by both parties as an award.

At this stage it will be desirable to set out the facts of the case as they would seem to have been found by the arbitrator. And here it is to be observed that there is extremely little controversy as to the evidence.

The dead woman at the time of her death was, and had been for a number of years, employed by Golden Hope Rubber Estate Limited as a weeding labourer on their Dusun Durian Estate at Banting. She lived on the estate in quarters provided by her employer with a man Kuppusamy, also employed on the estate, to whom she was not married but by whom she had two children. On the morning of 2nd October, 1961, she went to the daily "muster" of work-people which is held prior to commencing the labours of the day with a view to the work-people obtaining instructions. She and others received certain instructions, but she had provided herself with the wrong tool for her appointed labours and was minded to return to her home nearby to fetch a more appropriate implement (which was her employers' property) before proceeding to her place of work. This returning home after the assembly without permission (which she did not obtain) from someone in a supervisory capacity was against the rules of the estate. When she got home, in circumstances which are veiled in mystery for there was no eye-witness, she fell just outside the kitchen of her house. She had a serious haemorrhage and within a matter of minutes, and before she could be got to the estate hospital, she was dead. Later her body was examined by a doctor who found severe bruising of the wall of the uterus (which was six months pregnant) with separation of the placenta and bleeding and certified the cause of death as "trauma to uterus with bleeding and shock".

On these facts the arbitrator found that workman's compensation was payable to the two minor children of the deceased and he assessed the amount at $2,880. When his award is read in conjunction with the "findings" of the labour commissioner with which he expressed agreement it is clear that it proceeded on the basis that in his view the dead woman's action in going home to fetch her tool was done in breach of her employers' orders but that she did it for the purposes of and in connection with the employers' business and that if there had been no breach of orders the accident would have been deemed to arise out of and in the course of the employers' business.

The employers were minded to appeal against the arbitrator's award and applied for and obtained the necessary certificate from a judge that the award involved a question of law desirable in the public interest to be determined by the High Court. In the event the appeal was heard by Ong J. who came to the conclusion that at the time she fell Madam Sanjayee's employment for the day had not yet commenced and that consequently she had not died by reason of an accident arising out of and in the course of that employment.

Against that decision Madam Sanjayee's children have now appealed.

Our law relating to workmen's compensation, which is contained in the Workmen's Compensation Ordinance, 1952, is based upon, though it does not follow in every detail, the United Kingdom Workmen's Compensation Acts as they existed prior to 1948. The provisions of the Ordinance which are relevant to the present

case are contained in the following portions of section 4:—

"4(1)(a) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, save as hereinafter provided, be liable to pay compensation ....in accordance with the provisions of this Ordinance.

. . . . . .

(d) An accident happening to a workman shall be deemed to arise out of and in the course of his employment notwithstanding that he was at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if—

(i) the accident would have been deemed so as to have arisen had such act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and

(ii) such act was done for the purposes of and in connection with the employer's trade or business.

. . . . . .

(5) For the purposes of this Ordinance an accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment."

These provisions are, except in one respect, the same as the law as it was in the United Kingdom prior to 1948. The wording of sub-section (1)(a) is virtually the same as the wording of section 1(1) of the United Kingdom Act of 1925. Sub-section (1)(d) is the same as section 1(2) of the 1925 Act, except for the addition of sub-paragraph (i), which would appear to set out the effect of the decision of the House of Lords in the case of *Noble* v. *Southern Railway Co.*[1] and that it is not restricted, as is the corresponding English provision, to accidents which result in death or serious and permanent disablement. Sub-section (5) would appear to set out the effect of the decision of the House of Lords in the case of *Fisher* v. *London, Midland and Scottish Railway Co.*[2]

In the present case at the time of her fall the dead woman was acting in breach of her employers' orders and therefore if the case falls within the Ordinance at all it is by reason of paragraph (d) of section 4(1) and the onus of bringing the case within that paragraph lies on her dependants (see *Garrallan Coal Co., Ltd.* v. *Anderson*[3]). In other words to bring themselves within the Ordinance the dependants must shew that their mother's act in going home to get her tool was done for the purposes of and in connection with her employers' business and, in addition, that her fall would have been "deemed to be" an accident arising out of and in the course of her employment had she not at the time been acting in breach of orders.

Now, it may be observed *in limine* that the effect of section 4(1)(d) is in effect to cause certain accidents which do not arise out of and in the course of a workman's employment to be treated as if they did so arise. "No doubt that is why, by the section, the accident is not said to arise in the course of employment, but is deemed to arise" (*per* Lord Atkin: *Noble* v. *Southern Railway Co., supra,* at p. 595).

The same thing was put in a slightly different way in the same case by Viscount Maugham when he said (at p. 590) that the section:—

"merely provides an artificial extension of the actual scope of employment of the workman in the particular circumstances mentioned".

Coming now to the question of commencement of employment, on which Ong J. based his judgment, it was said by A. L. Smith L.J. in the case of *Holmes* v. *Great Northern Railway Co.*[4]:—

"It must be borne in mind that there is a difference between the beginning of a man's employment and the beginning of his work;",

and in the case of *Sharp* v. *Johnson & Co. Ltd.*[5] where a workman was injured through falling into a hole on his master's premises while going to get refreshment about 20 minutes before starting work Collins M.R. said:—

"I think that the proposition of law upon which the finding of the county court judge really proceeded was that, for the purposes of the Act, the employment of the workman cannot be said to have commenced until the moment when he actually began the work of painting. It seems to me that this clearly involves a misdirection, for I think that the authorities clearly shew that a reasonable margin must be allowed to the workman for the purpose of getting to the part of the premises where his actual work is to be carried on; and, if during that interval he is engaged in doing something which is for the benefit of his employer as well as of himself, e.g., in getting necessary refreshment upon the premises, he is just as much engaged in his employment as if he were engaged in the actual work which he has to do."

His Lordship then referred to the decision of the House of Lords in *Cross, Tetley & Co., Ltd.* v. *Catterall*[6] (which was then unreported) where Lord Halsbury L.C. said:—

"to my mind this is a pure question of fact. In order to be in the employment you must say at some point or another that the man was actually doing something on his employers' behalf."

In the present case I think it is clear that the work-people were expected to attend the morning "muster" to be allocated their tasks, particularly, as was the case here, on the first working day of the month. And on the evidence the inference clearly arises that the dead woman when she went to the morning assembly on the day of her death had every intention of proceeding from there to the place where she was actually to work. After all if she had intended to take a day off she would not have troubled to go to the "muster" at all, for it is clear from the respondent company's methods of supervision that any absence from work later in the day

would have been detected.

It is true that it is also clear on the evidence that if an employee attended at the morning "muster" and then, instead of proceeding direct to the appointed scene of her labours, returned to her dwelling for any purpose without obtaining permission then she would, if detected, have been liable to be stopped from work for the day and so, presumably, lose a day's wages. If in the present case before the accident happened she had been detected on her way home and told to stay off work until the next day then the case would have been on all fours with the case of *M'Garvey* v. *Caledonia Stevedoring Co., Ltd.*[7] where a docker who had overstayed the period for which he was permitted to be absent from work for a meal in the middle of his shift had before the accident which led to his death been replaced by his employer with another man for the remainder of his shift. But that is not what happened here. Nothing was done by the employers to terminate the contract of employment so far as that day's work was concerned. The woman went to "muster", she had every intention of going on to her working place, she went home to get her tool and while entering or leaving her house she fell and sustained her fatal injuries.

The real question here is whether on these facts we are entitled to say that the finding which is the basis of the arbitrator's award to the effect that both the conditions set out in paragraph (d) of section 4(1) were satisfied is wrong in law.

In this connection I do not think any useful purpose will be served by examining any of the reported cases prior to the decision of the House of Lords in the case of *Nobel* v. *Southern Railway Co., supra.*

As was pointed out by Viscount Dunedin in the case of *Fisher* v. *London, Midland & Scottish Railway Co., supra,* (at p. 357) :—

> "It is no use trying to decide a case simply by looking at decided cases and then inquiring which case most resembles the present on the facts."

Nevertheless the facts in *Nobel's* case are close enough to those in the present case to be related. A railway fireman was required to report for duty at the locomotive depot where he was employed and when he did so he was instructed to proceed to a neighbouring station. By the company's regulations he was forbidden to walk along railway lines except in the execution of his duty and there was a prescribed route which did not involve walking along a railway line for the journey he was required to take on the night he met his death. In spite of this he proceeded by a shorter route which did involve walking along the railway line which not only was forbidden but particularly at night was much more dangerous than the permitted route and in the course of doing so he was knocked down and killed by a train. On that it was held, reversing the decision of the Court of Appeal, that as there was nothing to show that the deceased had deviated from the safe route in order to fulfil any purpose of his own and that as he was still on the respondents' premises and was going about his allotted job, the necessary inference was that his case fell within section 1(2) of the Workmen's Compensation Act, 1925.

Viscount Maugham said (at p. 590) that in his opinion in any particular case in order to determine whether the case fell within the subsection it was necessary to ask and answer the following questions:—

> "First, looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of and in the course of his employment?
>
> Secondly, if the first question is answered in the negative, is the negative answer due to the fact that when the accident happened the workman was acting in contravention of some regulation or order?
>
> Thirdly, if the second question is answered in the affirmative, was the act with the workman was engaged in performing done by the workman for the purposes of and in connection with his employer's trade or business?"

In my view these questions embody the proper test to be applied in the present case. Asking them here the answer to the first question is clearly in the negative. As was said by Lord Atkinson in the case of *St. Helens Colliery Co., Ltd.* v. *Hewitson* [8] an accident arises in the course of a workman's employment:—

> "when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service."

In doing something which she was forbidden to do, that is to say to visit her house in the course of her journey from the place of "muster" to the place of work, the dead woman was certainly not doing anything that was imposed upon her by her contract of service.

That, however, is in my view the only reason why the accident did not arise in the course of her employment and therefore the answer to Viscount Maugham's second question is in the affirmative. If she had fallen while going direct to her place of work the accident would have been in the course of her employment. If she had fallen while going to the place of work by way of her house after having been given permission to do so the accident would have been in the course of her employment. The only reason why it was not in the course of her employment was that she had failed to seek and obtain the necessary permission.

And it is to be noted in parenthesis that in doing so she was not in any way exposing herself to additional perils as was the workman in

Nobel's case for one can imagine no safer place than her domestic doorstep which she was in the habit of passing and re-passing many times a day.

That brings me to Viscount Maugham's third question: was the act which the workman was engaged in performing done by her for the purposes of and in connection with her employers' trade or business? Here the answer is clearly in the affirmative. As far as the evidence goes, she did not go home to see to her children or to change her shoes or to fetch her lunch or for any other private purpose. She went home to fetch the tool which was necessary for doing her day's work and which was provided for her by her employers for that purpose, and it was clearly her intention, when she had obtained it, to go to the place where her employers required her to use it. As Scrutton L.J. said of a workman who was killed while fetching tools from a forbidden area of the colliery in which he was employed (*Thomas* v. *Pentremawr Colliery Co., Ltd.*[9]):—

"The question is whether the inference can be drawn that he went there because he was going to use the tools he went to fetch in his employers' business;"

The answer to that question here is "yes".

I am accordingly compelled to the conclusion that the appeal should be allowed and the award of the arbitrator restored.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal allowed.

Solicitors: *P. G. Lim; Shearn, Delamore & Co.*

PALANIAPPA CHETTIAR v. TAN JAN & ANOR.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) November 12, 1964]

[K.L. — Federal Court Civil Appeal No. 60 of 1964]

Moneylending — Certificate signed by moneylender or his agent — Certificate annexed to affidavit of moneylender's agent — Moneylenders Ordinance, 1951, s. 21.

Practice and procedure — Affidavit — Exhibit to — Whether part of — Signature.

The appellant was a moneylender and had lent a sum of $10,000 to the respondents who by way of security for the loan, had executed in his favour a charge of land. The respondents defaulted in payment and the appellant brought an action to realise his security. The proceedings were commenced by way of originating summons and the summons was supported by an affidavit setting out the necessary facts and having exhibited to it the moneylender's account and the certificate required by section 21 of the Moneylenders Ordinance. The certificate was not signed by the appellant. The learned judge dismissed the application on the ground that there had not been compliance with section 21 of the Ordinance as there was no certificate signed by the applicant or his agent.

Held: exhibits to an affidavit formed part of the affidavit as if they had been copied out in the affidavit and therefore in this case there was compliance with section 21 of the Moneylenders Ordinance as the certificate was part of the affidavit and the signature attached to the affidavit as a whole and to every part of it.

Cases referred to:—

(1) *In Re Hinchcliffe* [1895] 1 Ch. 117 at page 120.

(2) *Re Moritz (deceased)* [1959] 3 All E.R. 767.

FEDERAL COURT.

R. R. Chelliah and *P. S. Maniam* for the appellant.

N. Ramachandran for respondents.

Thomson L.P. (delivering oral judgment): This is an appeal from a decision of the High Court in Seremban.

The appellant is a moneylender and on 25th September, 1961, he lent a sum of $10,000 to the respondents who, by way of security for the loan, executed in his favour a charge of land.

In the event the respondents defaulted in their obligations under the contract of loan and on 17th December, 1963, the appellant commenced the present proceedings with a view to realising his security. The proceedings being for realisation of the security, which was a charge of land, and not being a suit on the contract, were commenced by way of originating summons and that summons was supported by an affidavit setting out the necessary facts and having exhibited to it the moneylender's account which, by section 21 of the Moneylenders Ordinance, is required to be produced on the commencement of any proceedings for recovery of money lent or for the enforcement of any security given in connection with money lent where the transaction attracts the provisions of the Moneylenders Ordinance.

The affidavit was signed by the appellant's agent and was attested by a commissioner for oaths. There were exhibited to it the charge and the certificate required by section 21. That certificate or rather, I should say at this stage, the sheet of paper on which it is written was not signed by the appellant. It was, however, clearly part of the affidavit which he had signed because it bore the certificate by the commissioner for oaths:—

"This is the Exhibit marked 'P3' referred to in the Affidavit of M. Veerappa Chettiar son of Muthuveerappa Chettiar affirmed before me this 29th day of November, 1963."

When the matter came on for hearing the point was taken up that there had not been compliance with section 21 of the Ordinance in that there was no certificate signed by the applicant or his agent. In the event the trial